regulations.[8] The law to that effect is well settled, see Annot. 9 A.L.R. 1423. Such contracts are subject to a condition implied in law that rates and charges may be superseded by utility regulation. Where, however, the municipality enters into a contract pursuant to express statutory authority to contract, the courts have recognized that the specific authority to contract, insofar as this authority conflicts with the general power conferred on the municipality to regulate public utility rates, should prevail.

In Limoneira Co. v. Ry. Comm., 174 Cal. 232, 162 Pac. 1033, the Supreme Court of California recognized the distinction between the two lines of authority, stating, p. 238:

"The uniform course of decision of the United States Supreme Court on questions similar in principle precludes any claim that the exercise by the state of the power to thus affect such an existing contract as that here involved impairs the obligation of contract within the meaning of the federal constitution. We are speaking, of course, of a situation where the state cannot be held as a matter of fact

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[8]Pinney and Boyle Co. v. Los Angeles Gas, etc. Corp., 168 Cal. 2d 12, 141 Pac. 620;
Law v. Railroad Comm., 184 Cal. 737, 195 Pac. 423;
Market St. Ry. Co. v. Pac. Gas & Elec. Co., D.C.N.D. Cal. 1925, 6 F.2d 633, appeal dismissed 271 U.S. 691;
Sutter Butte Canal Co. v. Railroad Comm., 202 Cal. 179, 259 P. 937, aff'd 279 U.S. 125;
Midland Realty Co. v. Kansas City Power and Light Co., 300 U.S. 109, rehearing denied 300 U.S. 687;
Union Drygoods Co. v. Georgia Public Service Corp., 248 U.S. 372.

to have surrendered to the public utility involved, by something tantamount to a contract between it and the public utility, any portion of the regulatory power. . . ."

The trial court attempted to distinguish the St. Cloud and Vicksburg cases, supra, on the theory that these decisions apply only to charges applicable "not to any one customer, but to all members of the public served," whereas in the present case the contract is between a municipality and a single customer. We think, however, that the instant case falls within the principle stated in the St. Cloud and Vicksburg decisions. If the municipality may be deemed as in the St. Cloud and Vicksburg cases to have surrendered its regulatory power as to the entire public, certainly it has the lesser power to suspend its rate-making authority as to a single customer. In Femmer v. City of Juneau, supra, this court decided that a municipality could so do. We conclude that insofar as the resolution of the Public Utilities Commission purported to abrogate the rates and charges fixed by the 1942 contract the resolution was void.

The City further contends that the rates and charges pertinent to the common use facilities are governed by the provisions of the contract wherein T.W.A. is authorized to use the said facilities "on the same terms and conditions as apply to others." This provision is followed, however, by a lengthy designation of fees which purports to set up an elaborate rate schedule. There can be no doubt on a reading of the agreement that the latter was intended

to fix the rates and charges for the common use facilities.

Reversed.

(Endorsed:) Opinion. Filed Dec. 19, 1955.

Paul P. O'Brien, Clerk.

EXHIBIT "B"

United States Court of Appeals for the Ninth Circuit

Trans World Airlines, Inc., a corporation, Appellant, vs. City and County of San Francisco, a municipal corporation, Philip S. Landis, Sam McKee, Victor S. Swanson, Edward B. Baron and Donald A. Cameron, as members of the Public Utilities Commission of the City and County of San Francisco, G. M. Dixon, as Manager and Chief Engineer of the San Francisco Airport, and J. M. Turner, Manager of Utilities for the Public Utilities Commission of the City and County of San Francisco, Appellees.	No. 14,523

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, and was duly submitted.

On consideration whereof, It is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is reversed, with costs in favor of the Appellant, and against the Appellees.

It is Further Ordered and adjudged by this Court, that the Appellant recover against the Appellees for its costs herein expended and have execution therefor.

(Endorsed) Judgment filed and Entered: December 19, 1955, Paul P. O'Brien, Clerk.

EXHIBIT "C"

In the United States District Court
For the Northern District of California,
Southern Division

Civil No. 30,326

Trans World Airlines, Inc., formerly known as Transcontinental & Western Air, Inc., a Delaware corporation,
Plaintiff and Cross-Defendant,

vs.

City and County of San Francisco, a California municipal corporation, et al.,
Defendants and Cross-Complainants.

ROCHE, District Judge: Plaintiff is a corporation which in the course of its business utilizes land and facilities so that its airplanes may land, take off, and be serviced and stored.

Defendant, represented by its Public Utilities Commission, business operator of the San Francisco Airport, in 1942 entered into a 20 year lease agreement with the plaintiff to furnish the land and facilities so used.

Twice during the life of this lease between the parties litigant, the Public Utilities Commission of the City regulated and prescribed rates which plain-

tiff and the other airlines were to pay for using the airport.

The rates prescribed by the Public Utilities Commission were higher than the rates fixed by the lease of plaintiff and defendant. Plaintiff refused, and still refuses to pay these higher rates, insisting that the limits of its liability are the charges fixed by the lease. Defendant has advised plaintiff that it must pay under the schedule of rates and charges, and that in default of such payments the airline will be deprived of certain facilities at the airport. This action for declaratory relief followed.

The City contends that the rates in the schedules are enforceable only as they apply to landings, take-offs, and other common use facilities; as to those properties not used in common it is admitted that the lease controls. The questions advanced may be summarized as follows:

(1) Does the furnishing of common use facilities at the airport to the airlines constitute a public utility service?

(2) Does the Public Utilities Commission of the City have rate-making jurisdiction over the airport?

(3) Does the law allow a public utility to depart from the regular schedule of rates and charges by contract?

(4) Does the doctrine of commercial frustration apply to the facts of this case?

1. Public Utility Function.

In the total design of the airport "common use facilities" are installed which are available in the operation of all aircraft. These are the runways, where planes land and take off; the landing aprons or ramps where passengers and cargo are taken on and discharged; the taxi-ways which connect the runways with the loading aprons or ramps; and other conveniences and facilities such as lights, signals, beacons, control tower, etc., shared by all airline companies utilizing the airport. The defendant maintains that the utilization of the enumerated areas and facilities involves the provision of a public utility service to the airlines as customers of this service.

Plaintiff counters with the proposition that the public to be served by the airport is the general public which uses it; that these people, and not the airlines, are the true customers of the airport's facilities. To support its argument plaintiff points out that 3,250,000 members of the general public used the airport last year, but that only 12 airlines are parties to the contracts entered into for facilities. However, the fact that only relatively few airlines use the service does not control the question. The number using the service may be few in number. *Camp Rincon Resort Co. v. Eshleman* (1916) 172 Cal. 561, 158 Pac. 186. Indeed, the fact that only one customer uses the services rendered does not control the question. *Ford Hydro-Electric Co. v. Town of Aurora* (1932) 240 N. W. 418, 206 Wis. 316.

What does control then? The factor which as far as the public is concerned which determines whether an agency is a public utility, is whether all persons, many or few, corporate or individual, who from the nature of the service rendered are in a position to require it, have a right to be supplied the service on equal terms. *Allen v. R. R. Commission* (1918) 179 Cal. 68, 175 Pac. 466. The limitations of place, requirements, ability to pay and other facts determine the customers that will use a particular service. *Terminal Taxicab Co. v. Kuntz* (1916) 241 U. S. 252, 60 L. Ed. 984.

Plaintiff cites the cases of *Marin Water Co. v. Town of Sausalito* (1914) 168 Cal. 587, 143 Pac. 767, and *Del Mar Water Co. v. Eshleman* (1914) 167 Cal. 666, 140 Pac. 591, as instances where the court found that the contracting parties were not in a relationship of public utility and customer. In the Marin Water case a water company contracted to supply a municipality with a bulk supply of water for 10 years. The municipality in turn sold the water to its inhabitants. The question raised was whether the water company was functioning as a public utility in supplying the City with water under this contract. This case is inapplicable as it involves a sale in bulk of a commodity from one utility to another. In the instant case there is a continuing service rendered by one utility to another, this latter utility being a member of the general public served.

The Del Mar case is also distinguishable. The court found in this case that the utility had not offered

its water to the general public. The sale of water to the 17 inhabitants of the town of Del Mar was on a per barrel basis. It was like the private sale of water by a farmer having a well in his backyard. This case is limited to cases presenting similar facts.

The public function of a municipal airport is recognized in many cases, *State ex rel. City of Lincoln v. Johnson* (1928) 117 Neb. 301, 220 N. W. 273; *State v. Jackson* (1929) 121 Ohio St. 186, 167 N. E. 396; *Price v. Storms, et al., Board of Trustees, Town of Okewah* (1942) 191 Okla. 410, 130 Pac. (2d) 523; *Jones v. Keck* (1946) 74 Ohio App. 549, 74 N. E. (2d) 644; *City of Toledo v. Jenkins* (1944) 143 Ohio St. 141, 54 N. E. (2d) 656; *State v. Board of County Commissioners* (1947) 149 Ohio St. 583, 79 N. E. (2d) 698. In the case of *Toledo v. Jenkins,* cited supra, the court stated, "The statutory provisions confer upon the municipal corporation power to own or lease and operate landing fields and improve them with runways, buildings or other structures, so as to make them fully equipped aircraft and transportation terminals. As an airport of that character is a public utility (*State ex rel. Chandler v. Jackson,* 121 Ohio St. 186, 167 N. E. 396), the Toledo Municipal Airport was and is a complete public utility."

The San Francisco Airport has been built with public funds for the public use. It is the determination of this court that this use is twofold. On one hand for the use of the air-traveling public, and on the other, for the use of those individuals and corporations using the airport for their aircraft. Certainly

this latter group is more restricted than the former, but this fact does not mitigate against the public utility function of the City as regards the common use facilities. These facilities are offered to the airline companies as customers of the airport; they are offered as a public utility service.

2. Rate-Fixing Power of the San Francisco Public Utilities Commission Over the San Francisco cisco Airport.

Section 121 of the charter of the City and County of San Francisco gives the Public Utilities Commission jurisdiction over the airport, and provides in part:

"The public utilities commission shall have charge of the construction, management, supervision, maintenance, extension, operation and control of all public utilities and other properties used, owned, acquired, leased or constructed by the city and county, including airports, for the purposes of supplying any public utility service to the city and county and its inhabitants, to territory outside the limits of the city and county, and to the inhabitants thereof."

The rate-fixing power of the Public Utilities Commission is found in Section 130 of the charter, which provides in part:

"The commission shall have the power to fix, change and adjust rates, charges or fares for the furnishing of service by any utility under its jurisdiction, and to collect by appropriate means all amounts due for said service, and to discontinue service to

delinquent consumers and to settle and adjust claims arising out of the operation of any said utilities.

Rates may be fixed at varying scales for different classes of service or consumers. The commission may provide for the rendition of utility service outside the limits of the city and county and the rates to be charged therefor which may include proportionate compensation for interest during the construction of the utility rendering such service."

No confusion should arise by reason of the coincidence that the rate-fixing body in this case happens to be the Public Utilities Commission, also having jurisdiction over the utility itself. In entering the lease the Public Utilities Commission was acting proprietarily. In the exercise of its rate-fixing power the commission is acting as a public rate-fixing body even though it is engaged in a function as operator of the utilities. *Connett v. City of Jerseyville,* 110 Fed. (2d) 1013. In California a municipality has the power to fix rates and charges of municipally owned utilities. *Durant v. City of Beverly Hills* (1940) 39 Cal. App. (2d) 133, 102 Pac. (2d) 739; *Jochimsen v. City of Los Angeles* (1921) 54 Cal. App. 715, 202 Pac. 902; *Bowles v. City and County of San Francisco* (1946) 64 Fed. Supp. 609; *City of Pasadena v. Railroad Commission* (1920) 183 Cal. 526, 192 Pac. 25. The approved charter of a municipality is a law of the state and has the same force and effect as a law enacted by the legislature. *Yosemite, etc. v. State Board of Equalization* (1943) 59 Cal. App. (2d) 39. Under Section 130 of the charter the Public Utilities

Commission is empowered to establish rates and charges for the furnishing of utility services outside the limits of the city and the rates to be charged therefor. In order for the services of an airport to be rendered outside the limits of a municipality it necessarily follows that the airport be constructed outside the boundaries of the municipality.

Plaintiff contends that the police power of the city, including its rate-fixing power ceases at its borders, and that only a proprietary power may be exercised beyond its borders. *South Pasadena v. Terminal Ry. Co.* (1895) 109 Cal. 319, 41 Pac. 1093; *Incorporated Town of Sibley v. Ocheydan Electric Co.* (1922) 194 Iowa 950, 187 N. W. 560; *City of Colorado Springs v. Colorado City* (1908) 42 Colo. 75, 94 Pac. 316. This is true except in those cases where the legislature has provided for the exercise of this power. The charter of the city, approved by the legislature, specifically provides for the exercise of this power, and therefore the Public Utilities Commission has jurisdiction to set the rates and charges for the common use facilities at the airport.

3. Departure From the Prescribed Rates by Contract.

It is this court's decision that in affording the common use facilities at the airport to the airlines that the City is engaged in a public utility function. Plaintiff contends that, notwithstanding this fact, the City can by lease agreement fix with each individual air-

line using the airport the charges for these facilities and services for a definite term.

Plaintiff cites two Supreme Court cases, *Home Telephone Co. v. Los Angeles* (1908) 211 U. S. 265, and *Public Service Co. v. St. Cloud* (1924) 265 U. S. 352, as instances where a public utility was held to have entered into a binding contract for the furnishing of a utility service at a fixed charge. Both cases are distinguishable from the instant case.

The charges fixed by contract in both of these cases were applicable not to any one consumer alone, but to all members of the public served. In other words, any member of the public utilizing the public utility service offered had a right to be served at the same price paid by those similarly situated. In the instant case the lease agreement constitutes nothing more than a contract between *one* consumer, and a public utility, not for the purpose of establishing a uniform rate to be charged all members of the public using the utility, but rather to establish a preferential position for this one consumer for twenty years. A contract of this type is entirely valid when executed, and is binding in the absence of rate regulation by the Public Utilities Commission acting on behalf of the public. Any intention on the part of the parties to fix charges not subject to regulation is inoperative as a matter of law. The decisions next mentioned fully support the conclusion that, with reference to the common use facilities, the general schedule applicable to all must as a matter of law, be applied to this contract.

The case of *Pinney & Boyle Co. v. Los Angeles Gas Co.* (1914) 168 Cal. 12, 141 Pac. 620, decided by the Supreme Court of this state is in point. This was a suit to enforce the terms of a contract entered into between plaintiff and defendant whereby the plaintiff agreed to take for operation of its machinery, and defendant to supply electricity for that purpose. Defendant was engaged as a public utility in the supply of electricity to the inhabitants of the City of Los Angeles. While this private contract between the parties was in existence, the City of Los Angeles, through its legislative body, regulated and prescribed the rates which the defendant public service corporation was permitted to charge consumers. Apparently, at the time of the contract, the rate-fixing power had not been exercised by the municipality.

The court held that the fixation of the rate thus adopted controlled over the terms of the contract. The court ruled that a contract of such nature must necessarily yield to a subsequent exercise of the rate-fixing power. This was on the ground that the parties are deemed to have contracted with that result in view. A holding, identical to that made in the case which has preceded appears in *Law v. Railroad Commission* (1921) 184 Cal. 737, 195 Pac. 423.

Various other decisions of the Supreme Court of California are in accord. *Leavitt v. Lassen Irrigation Co.* (1909) 157 Cal. 82, 106 Pac. 404; *Limoneira Co. v. Railroad Commission* (1917) 174 Cal. 232, 162 Pac. 1033.

Decisions of the Supreme Court of the United States are in accord. *Midland Realty Co. v. Kansas City Power and Light Co.*, 300 U.S. 109, 81 L. Ed. 540, 57 S. Ct. 345; *Union Drygoods Co. v. Georgia Public Service Corp.*, 248 U. S. 372, 63 L. Ed. 309, 37 S. Ct. 117, 9 A.L.R. 1420. See also, Annotation 74 L. Ed. 234 reviewing both the California and Federal cases on this subject.

Plaintiff contends that it would be unfair for this court to declare the lease inoperative, and to hold it subject to the prescribed rates and regulations of the Public Utilities Commission. The reason put forth is that plaintiff would not have entered into a lease of hangar space without having fixed with the City in advance the charges as to the common use facilities. This argument is without merit. If it were not a manufacturer might well argue that he would not have leased a factory for 20 years except for the fact that he was able to fix by contract the price of his electricity and water for the same period. Clearly if a contract had been entered into for these utility services at a fixed rate, subsequent regulation by the proper body, would affect the charges agreed upon.

The fact that the City is both the lessor of hangar space and the provider of the common use facilities does not change the holding in this case. The hangars are constructed and leased so that the customers of the City at the airport (the airlines) can better avail themselves of the common facilities offered. This in no way affects the holding that the airport, as far as

the common use facilities are concerned, is offering a public utility service, the rates for which can be set by the Public Utilities Commission of San Francisco.

4. Commercial Frustration as a Defense.

The City as a distinct and separate defense contends that the "doctrine of commercial frustration" should apply in this case, thus enabling the City to avoid the lease agreement with plaintiff.

It is evident from the testimony and documentary evidence presented in this case that this defense is without merit.

In accordance with the foregoing it is Ordered

1. That Trans World Airlines, Inc., account to the defendants and cross-complainants in this action as to the extent of its operations to and from San Francisco Airport from and after December 31, 1950.

2. That judgment be entered herein in favor of defendants, on findings of fact and conclusions of law, and that the injunction pendente lite be denied.

3. That judgment in favor of cross-complainants be entered herein in an amount to be determined. Counsel is directed to prepare findings of fact and conclusions of law in conformance with the opinion. Each party to pay its own costs.

FILED
APR 10 1956
HAROLD B. WILLEY, Clerk

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1955

No. 765

CITY AND COUNTY OF SAN FRANCISCO,
a municipal corporation, et al.,
Petitioners,

vs.

TRANS WORLD AIRLINES, INC.,
a corporation,
Respondent.

BRIEF OF RESPONDENT, TRANS WORLD AIRLINES, INC., IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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In the Supreme Court
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No. 765

CITY AND COUNTY OF SAN FRANCISCO,
a municipal corporation, et al.,
Petitioners,

vs.

TRANS WORLD AIRLINES, INC.,
a corporation,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION.

I.

OPINIONS BELOW.

The opinion of the Court of Appeals (R. 727) is reported at 228 F.2d 473. The opinion of the District Court (R. 167) is reported at 119 F.Supp. 516. Each is reprinted in the appendix to the petition for a writ of certiorari.

II.

STATUTES INVOLVED.

The pertinent parts of the statutes involved are printed in the appendix to this brief.

III.

PRELIMINARY STATEMENT.

Petitioner, the City and County of San Francisco, as operator of the San Francisco International Airport, made a contract granting the respondent airline the right to use the facilities of the airport and providing the charges for such use (R. 16, 20-21). This contract was made in 1942 for a 20-year term (R. 14, 16). Thereafter in 1951 the City claimed that the contract charges (R. 20-21) were superseded by its own unilateral action under an alleged power of public utility rate making (R. 55) as to the runways, navigation aids, passenger and baggage areas, and other facilities used by other airlines as well as by TWA ("common use facilities"). Respondent sued for declaratory relief. The Court of Appeals, reversing the judgment of the District Court (R. 167) held the contract valid (R. 727).

The petition for certiorari is inaccurate, both in its statement of the case and of the questions involved. As will appear, there is no conflict of decision between circuits, nor any conflict between the decision of the Court of Appeals and California law. Contrary to assertions of the petition, the case involves no question of public importance. The only federal question discussed in the

petition (p. 7) is unsubstantial on the face of the statutes cited. It was raised for the first time by the City's petition for rehearing in the Court of Appeals, a petition which that court denied without opinion.

The case involves no question concerning legislative power. What Congress or the California Legislature might constitutionally do in regulating charges by airports to airlines for the use of airport facilities is not before the Court. No such regulation has been undertaken by federal authority, and the state statute expressly authorizes the present contract.

The Civil Aeronautics Act, first referred to in the City's petition for rehearing in the Court of Appeals, gives the Civil Aeronautics Board the power *to regulate air carriers and the rates of air carriers* (June 23, 1938, secs. 404, 1002, 52 Stat. 993, 1018; 49 U.S.C. 484, 642(d); Appendix, this brief, p. v.) It does not provide for regulating airports or the charges of airports, or for any filing by airports of tariffs or rate schedules.

The Federal Airport Act (May 13, 1946, 60 Stat. 170, 49 U.S.C. 1101), one section of which (49 U.S.C. 1110) is cited in the petition for certiorari (pp. 13, 30), is not a statute regulating airports, but authorizes Federal monetary and other aid for airport development and construction. It was not mentioned below until the petition for rehearing.

The case turns solely upon questions of California law. The state statute gives municipalities, in the words of the Court of Appeals, *"plenary authority to lease and contract"* concerning the use of the facilities of municipal

airports and the charges therefor (Appendix, Petition for Certiorari, p. iv).[1] The City has never disputed that the statute grants contracting authority. The City's point is that the statute does not apply to cities with freeholders' charters—though the statute says it does[2]—because operation of the airport is a "municipal affair" (see Petition for Certiorari, pp. 19 et seq.).

As pointed out by the Court of Appeals in overruling the City's contention, the term "municipal affair" is a technical one, governed by California law. Under section 8(j) of Article XI of the California Constitution (Appendix, this brief, p. i), the term marks a line between matters subject exclusively to municipal control and those governed by general state laws. A city with a freeholders' charter is bound by general state law except as to "municipal affairs"; i.e., under the California cases construing the state Constitution, *matters of strictly local interest.* The operation of an international airport is not a matter of strictly local interest and is subject, therefore, to the general laws of the state. As the Court of Appeals said (Appendix, Petition for Certiorari, p. v):

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[1]California Municipal and County Airport Law (Cal.Stats. 1927, c. 267, sec. 4, pp. 485, 487, Appendix, this brief, pp. ii-iii). See quotation by Court of Appeals (Appendix, Petition for Certiorari, pp. iii-iv).

[2]The statute grants power to municipalities generally, but it also makes specific reference to cities "operating under a freeholders' charter" and also to "*any city and county,*" which means to San Francisco, the only city and county in the state. The statute makes general reference to airport facilities, but it also mentions "all places for flying take-off and landing of aircraft • • • signal lights, radio equipment • • • and other *air navigation* facilities"—in the idiom of the case at bar, "common use facilities." See Appendix, this brief, p. ii.

"The phrase 'municipal affair' is a term of art. Its meaning as used in the constitution must be sought in the decisions of the California courts. The latter courts have repeatedly declared that a matter is not a 'municipal affair' unless it is of strictly local interest. Any doubt is to be resolved in favor of state regulatory power. [Citing California decisions[3]].

* * * * *

The facts of the instant case place it much farther outside the orbit of a 'municipal affair' than do those of any of the cases, supra.

The airport is not a strictly local affair. It is a part of a global system of air transportation."

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[3]Among the decisions cited are: *Pacific Tel. & Tel. Co. v. City of Los Angeles* (1955) 44 Cal.2d 272, 282 P.2d 36, holding that the right to conduct a telephone business in Los Angeles is not a municipal affair; *Los Angeles Ry. Corp. v. Los Angeles* (1940) 16 Cal.2d 779, 783-785, 108 P.2d 430, holding that the city has no right to require two-men crews on car lines serving both the city and the outlying areas; *Bay Cities Transit Co. v. Los Angeles* (1940) 16 Cal.2d 772, 777, 108 P.2d 435, holding that the city has no right to divert busses from the Venice freeway; *Civic Center Assn. v. Railroad Comm.* (1917) 175 Cal. 441, 450-451, 166 Pac. 351, holding that the state commission has the right, and the city no right, to compel railroads to establish a union depot in Los Angeles.

See also *Pacific Tel. & Tel. Co. v. City of Los Angeles* (1955) 44 Cal.2d 272, 282 P.2d 36; *Ex Parte Daniels* (1920) 183 Cal. 636, 192 Pac. 442, holding that "if there is a doubt as to whether or not such regulation is a municipal affair, that doubt must be resolved in favor of the legislative authority of the state" (183 Cal. 639).

If the operation of the airport were a "municipal affair"—which it is not—the City would still have had *charter* authority to make the contract in suit because a freeholders' charter gives the city all powers over municipal affairs which are not expressly withheld (*West Coast Adver. Co. v. San Francisco* (1939) 14 Cal. 2d 516, 95 P.2d 138). Contracting authority is also implicit in the City's statutory and charter power to manage the airport (see Appendix, this brief, pp. iii, iv; *Femmer v. City of Juneau* (9 Cir. 1938) 97 F.2d 649, 652).

The existence of express statutory authority for the contract in suit makes applicable a legal principle "too frequently declared to admit of doubt,"[4] which is completely decisive of the case. Where a municipal corporation has statutory authority to deal with a given situation *either* by contract *or* as a matter of utility rate regulation, then if it elects to proceed by contract it is bound by the contract for the full term, and cannot unilaterally alter the contract under regulatory powers. The Court of Appeals held that the present case, involving a contract for a nonexclusive use by a public service corporation of a municipally owned facility, is typically within this rule. The court cited many supporting authorities, including decisions of this Court (Appendix, Petition for Certiorari, pp. viii-ix).[5]

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[4] *Vicksburg v. Vicksburg Waterworks Co.* (1907) 206 U.S. 496, 508, quoted by the Court of Appeals (Appendix, Petition for Certiorari, p. ix).

[5] The Court of Appeals said (Appendix, Petition for Certiorari, pp. viii-ix):

> "The City has bound itself as to rates and charges for the common use facilities by entering into a valid contract expressly authorized by state law. Even so, argues the City, the rate schedule of the contract was superseded by subsequent regulation by the Public Utilities Commission. In discussing this contention we assume arguendo that the Public Utilities Commission's regulatory jurisdiction extends to the airport.
>
> The City had authority under this assumption to proceed by contract or by regulation. It elected to proceed by contract. The rule of law governing a subsequent attempt by the municipality to vitiate a contract such as that before us through subsequent exercise of its regulatory power is well stated in 43 Am.Jur., §88:
>
> 'It has been held in numerous cases, however, that a state legislature unless prohibited by constitutional provision may authorize a municipal corporation to establish by an inviolable contract the rates to be charged by a public utility for a reasonable term of years, the effect of which is to suspend,

Since the rule applies where a municipality has *coexisting* contracting and regulatory authority, and elects, as did the City here, to proceed by contract, it follows that the contract in suit is valid whether or not the airport or some segment of it is a public utility. It is valid regardless of whether the City has, or had in 1942, regulatory power over charges to the airlines for the use of airport facilities. Such questions are simply immaterial in the case at bar. The Court of Appeals assumed "arguendo" that the City has regulatory power over the airport (Appendix, Petition for Certiorari, p. viii).

Since the belatedly raised federal question is unsubstantial, and since the California statute expressly authorized the City to make this contract, the principle applied by the Court of Appeals requires the decision

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during the life of the contract, the governmental power of the state or municipality to fix or regulate the rates.' See also, Annot. 74 L.Ed. 234, 236, to the same effect.

Authorities sustaining this rule are Public Service Co. v. St. Cloud, 265 U.S. 352, Vicksburg v. Vicksburg Waterworks Co., 206 U.S. 496, and Femmer v. City of Juneau, 9 Cir. 1938, 97 F.2d 649. In the Vicksburg case the Supreme Court held, p. 508:

'That a state may, in matters of proprietary rights, exclude itself from the right to make regulations of this kind or authorize municipal corporations to do so, when the power is clearly conferred, has been too frequently declared to admit of doubt. Los Angeles v. Los Angeles City Water Co., 177 U.S. 558, Walla Walla v. Walla Walla Water Co., 172 U.S. 1-7, New Orleans Waterworks Co. v. Rivers, 167 U.S. 674, Freeport Water Co. v. Freeport, 180 U.S. 587-593.'

In the instant case the statutory authority conferring the power to contract was more express than that found sufficient in the cases above noted."

California municipalities operate municipal airports in their proprietary capacity (*Pignet v. City of Santa Monica* (1938) 29 Cal.App.2d 286, 287, 84 P.2d 166; *Coleman v. City of Oakland* (1930) 110 Cal.App. 715, 719-720, 295 Pac. 59; *Marin Water etc. Co. v. Town of Sausalito* (1914) 168 Cal. 587, 594-595, 143 Pac. 767).

which that court made and would, we submit, permit no other. We will, nevertheless, comment on each point made by the petition, starting with its statement of the case, which is inadequate to the point of misleading.

IV.

CORRECTION OF PETITIONERS' STATEMENT OF THE CASE (Petition, pp. 3-7).

The instrument by which the City claims that the 1942 contract was superseded as to charges for the common use facilities is a "schedule" of the municipal Public Utilities Commission effective January 1, 1951 (R. 55). Actually this schedule does not purport to affect the contract; its opening paragraph, to which no reference is made in the petition for certiorari, is as follows (R. 55):

> "Section 1. General Provisions: *Except as otherwise provided, or amended by agreement,* the Public Utilities Commission hereby adopts the following rates and charges for the use of the facilities and services of the San Francisco Airport."[6]

The petition for certiorari creates throughout the misimpression that the municipal Public Utilities Commission is a purely regulatory body. Actually it has broad powers of *management* over the airport (Charter, sec. 121, quoted Appendix, this brief, p. iv); it is a managerial as well

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[6]Even apart from the express exception in the schedule, the City could not affect the contract merely by its own unilateral action in filing a new "schedule of rates." See *Federal Power Commission v. Sierra Pacific Power Company* (Feb. 27, 1956) 24 U.S. Law Week 4094, 4095, and *Wichita R.R. v. Pub. Util. Comm.* (1922) 260 U.S. 48, 58.

as a regulatory body. The Commission and its representative, the airport manager, **negotiated** the present contract (R. 309), and treated it for eight years as a contract. None of the facts in this regard appear from the petition for certiorari. Briefly they are:

When the agreement was made in 1942 the airport had only two scheduled air carriers, TWA and United Airlines (R. 277, 308). The Airport Manager testified that competition with other airports to obtain permanent airline service was a factor inducing the City to make the agreement (R. 315, 317-318).[7]

The Airport Manager, after negotiations with TWA, made a draft of agreement (R. 310); the City Attorney's office worked it into final form (R. 310); it was then approved by the City Attorney, by the Manager of Utilities and by the Director of Properties (R. 36); recommended by the Public Utilities Commission (R. 39), and executed by the Mayor after public advertisement and upon unanimous authorization by the Board of Supervisors (R. 36-41). Three supplementary agreements were

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[7]The following language of this court in *United Gas Pipe Line Company v. Mobile Gas Service Corporation* (Feb. 27, 1956) 24 U.S. Law Week 4090, has some pertinence here (p. 4093):

"Our conclusion that the Natural Gas Act does not empower natural gas companies unilaterally to change their contracts fully promotes the purposes of the Act. By preserving the integrity of contracts, it permits the stability of supply arrangements which all agree is essential to the health of the natural gas industry. Conversion by consumers, particularly industrial users, to the use of natural gas may frequently require substantial investments which the consumer would be unwilling to make without long-term commitments from the distributor, and the distributor can hardly make such commitments if its supply contracts are subject to unilateral change by the natural gas company whenever its interests so dictate."

made in 1946, 1947, and 1948 (R. 41-43, 45-52). None referred to "rate schedules" and all expressly confirmed the original agreement; illustrative is the supplement of June 2, 1948 (R. 54).

In 1946 the Public Utilities Commission made a new "schedule of rates and charges" (City's Exh. B, an original exhibit (R. 721)). Like the later schedule of 1951 it applied "except as otherwise provided, or amended by agreement." The petition for certiorari mentions the 1946 schedule (p. 5) but not the exception therein, nor the fact that although the scheduled charges were higher, the City continued to bill TWA at contract rates (R. 248, 254).

In December 1947, the City made an agreement with United Air Lines of a general nature similar to the agreement with TWA (R. 393), again electing to proceed by contract rather than by its supposed power of rate regulation.

At pages 4-5 the petition quotes part of section 3 of the contract, arguing that, as a matter of contract, the charges therein set forth would vary in accordance with future "schedules" adopted by the Commission. This point simply involves construction of the contract and is not assigned as a reason for granting the writ. The Court of Appeals rejected the argument, holding that the contract phrase "use, in common with others authorized so to do and on the same terms and conditions as apply to others," refers to *use* and not to rates of charge (Appendix, Petition for Certiorari, p. xi). The Court pointed out that the contract sets forth the charges explicitly (R. 20-21); it sets them up as contractual items without reference to any "schedule," existing or future (R. 20-

21); the charges were fixed by negotiation (R. 285, 309); section 13 prohibits charges or fees "Except as otherwise expressly provided for in this lease and agreement" (R. 28).

The petition refers to the large sums spent for airport improvements since the making of the 1942 contract, but does not relate these statements to any legal issue. The contract, obviously contemplating the probability of such improvements, provided for escalation of contract charges in several particulars, including escalation for increase in size of planes (R. 21, 324).

The petition by its insistence that "the airport" is a public utility tends to create the impression that the City regulates the "rates" to be paid by all enterprises using airport facilities, with TWA as a lonely exception. Actually the City claims rate-making power only as to one segment of airport operation, i.e., the use of certain facilities by the airlines and various matters relating to delivery of petroleum products for aircraft use (R. 68-72). It *disclaims* rate-fixing power as to almost all enterprises using the airport, regardless of whether they use its facilities "in common." There is no fixing of "utility rates" to be paid by bus lines or other transportation companies, by public utilities serving the airport, or by parking lots, renters of office and administration space, or by concessions and services of all sorts and kinds (R. 384-390). Regulatory authority is disclaimed as to many facilties used by the airlines; thus the contract in suit is admittedly binding (R. 390) in its provisions concerning hangar space, parking space for aircraft, shop and repair facilities, and office and administrative quarters (R. 15-18).

The above facts show, contrary to the implications of the petition, that even the City's *claims* for regulatory authority at the airport are very limited, and that contractual arrangements under the City's proprietary powers of management are the rule, not the exception, in providing for the use of airport facilities.

V.

ARGUMENT.

A. THERE IS NO MERIT IN THE CITY'S REASONS FOR ALLOWANCE OF THE WRIT

(Answering Petition for Certiorari, pp. 7-8).

1. No conflict with state law.

The alleged conflict relates to the ruling of the Court of Appeals that operation of the airport is *not* a "municipal affair" and consequently *is* subject to the general laws of the state which gave specific authority for the contract in suit.

The City argues this point at pages 19-27 of the petition for certiorari, and the gist of its argument is this sentence (p. 22):

> "If municipally owned water, light, heat and power systems are 'municipal affairs,' it necessarily follows that a municipally owned airport is a 'municipal affair.'"

The cases, including *City of Pasadena v. Railroad Commission* (1928) 183 Cal. 526, 192 Pac. 95, cited in the petition for certiorari (p. 22) to show that a city waterworks is a "municipal affair," were *not decided* under

the municipal affair provisions of the California Constitution (Article XI, secs. 6, 8(j), Appendix, this brief, p. i). They *do not hold* that the operation even of a municipal waterworks is beyond the operation of general state laws. Their point is that under another provision of the California Constitution, section 19 of Article XI, municipalities can *operate* certain public works and that section 22 of Article XII gives the state Public Utilities Commission no jurisdiction over them. *Polk v. City of Los Angeles* (1945) 26 Cal.2d 519, 539, 159 P.2d 931, quoted in the petition (p. 23) is one of the California cases explicit on this point.

Further, while a municipal waterworks or bus line might be of purely local interest and hence a "municipal affair," such reasoning could not be applied to an international airport. This is shown by the California cases cited by the Court of Appeals (Appendix, Petition for Certiorari, pp. v-vii, and supra 5), concerning which the court said (Appendix, Petition for Certiorari, p. vi):

> "The facts of the instant case place it much farther outside the orbit of a 'municipal affair' than do those of any of the cases, supra.
>
> The airport is not a strictly local affair. It is part of a global system of air transportation."

2. No jurisdiction in Civil Aeronautics Board to regulate airport charges for use of airport facilities.

Here the decision of the Court of Appeals is said to raise "the question of whether the Civil Aeronautics Board has jurisdiction to regulate rates and charges for common use facilities at airports serving interstate air

carriers." The opinion of the Court of Appeals does not discuss such a question because the City first raised it by petition for rehearing.

The Civil Aeronautics Act answers the City's question in the negative. A quick panoramic view of the statute can be had by looking at the outline of subchapters and headings in the United States Code (49 U.S.C.A. 401 et seq.). Subchapter 4 deals with "*Air Carrier* Economic Regulation." The statute gives the Civil Aeronautics Board authority to regulate *interstate and international air carriers,* and as to rates, gives authority to regulate *the rates of such carriers* (see 49 U.S.C. 482, 484; see also 642(d) quoted in the appendix to this brief, pp. vi-vii).

In the report of the Senate Committee on Commerce preceding the enactment of the Civil Aeronautics Act, the Committee said:

> "The bill provides for the usual system of economic regulation of air-transportation companies and applies to all air carriers, who operate as common carriers or who transport mail by air. The legislation is adapted to the special characteristics of transportatic by air and is, at present, carried no further than is necessary in the interests of the public and of civil aeronautics" (S. Rept. 1661, 75th Cong., 3d Sess., Apr. 20, 1938).

Section 401 of the statute giving definitions includes the following (49 U.S.C. 401(10)):

> "'Air transportation' means interstate, overseas, or foreign air transportation or the transportation of mail by aircraft."

The statute does not provide for regulating charges by *airports* for the use of airport facilities.[8] It may be noted in this regard that a complaint case before the Civil Aeronautics Board was recently brought by several airlines, who alleged illegality in sliding scale landing charges made by the Miami International Airport. The Board dismissed the complaint as outside its jurisdiction (In the Matter of the Complaint of Various Air Carriers and Foreign Air Carriers Serving Miami, Florida, Civil Aeronautics Board, Docket No. 7324, Order No. E-9911, January 12, 1956).

3. No conflict with decisions of the Supreme Court.

The decision below is said to permit "discrimination" contrary to decisions of the Supreme Court, presumably *United States v. Baltimore & O. R. Co.* (1948) 333 U.S. 169, and other cases cited later in the petition (pp. 15-16).

All these cases involved carrier-shipper relations, which the case at bar does not. All but one were under the Interstate Commerce Act. Decisions under that Act, however, are not controlling under statutes with different provisions (*United Gas Pipe Line Company v. Mobile Gas Service Corporation* (Feb. 27, 1956) 24 U.S. Law Week 4090, 4091, involving the Natural Gas Act).[9]

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[8]Regulatory authority, of course, cannot be implied but must rest upon some explicit provision in the statute (*Stark v. Wickard* (1944) 321 U.S. 288; *Siler v. Louisville & Nashville R. R. Co.* (1909) 213 U.S. 175, 194).

[9]"In this respect [permitting rates to be established initially by contract], the Act is in marked contrast to the Interstate Commerce Act, which in effect precludes private rate agreements by its requirement that the rates to all shippers be uniform, a requirement which made unnecessary any provision for filing contracts. See *Armour Packing Co.*

There is no pleading, no evidence, and no finding of discrimination in the case at bar. The record shows only that the rates in the 1942 contract are lower than those in the 1951 "schedule" of the City. But difference and discrimination are not synonymous terms.[10] A contract authorized by law is not an illegal "discrimination". The very existence of statutory contracting authority contemplates that the terms of contracts may differ; otherwise the grant of authority is meaningless (see *United Gas Pipe Line Company v. Mobile Gas Service Corporation*, quoted below, n. 9).

4. No conflict between circuits.

This alleged conflict is with *S. S. W., Inc. v. Air Transport Ass'n of America* (D.C.Cir. 1951) 191 F.2d 658 (Petition for Certiorari, p. 28). In that case a "non-scheduled" interstate air carrier brought suit under the anti-trust laws against certificated carriers and their trade association, alleging conspiracy to monopolize air-borne

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v. United States, 209 U.S. 56. The Commission in its brief recognizes this basic difference between the two Acts and notes the differing natures of the industries which gave rise to it. The vast number of retail transactions of railroads made policing of individual transactions administratively impossible; effective regulation could be accomplished only by requiring compliance with a single schedule of rates applicable to all shippers. On the other hand, only a relatively few wholesale transactions are regulated by the Natural Gas Act and these typically require substantial investment in capacity and facilities for the service of a particular distributor."

The petition for certiorari points out that twelve scheduled airlines now use the San Francisco Airport (p. 3).

[10] *U.S. v. Wabash R. Co.* (1944) 321 U.S. 403, 411; *Barringer & Co. v. United States* (1942) 319 U.S. 1, 7; *Texas & Pacific Ry. Co. v. U.S.* (1933) 289 U.S. 627; *Live Oak W. U. Assn. v. Railroad Com.* (1923) 192 Cal. 132, 219 Pac. 65; *Durant v. City of Beverly Hills* (1940) 39 Cal.App.2d 133, 102 P.2d 759.

commerce by various illegal practices (191 F.2d 660). The court held that the same act by an air carrier might violate the antitrust laws and also the Civil Aeronautics Act; however, that there would be no antitrust violation in a practice of air carriers which the Civil Aeronautics Board, acting within its jurisdiction, found to be legal under the Civil Aeronautics Act (191 F.2d 664); hence that there was an administrative remedy to exhaust, and that the antitrust suit should be stayed pending the Board's determination as to the validity under the Civil Aeronautics Act of the practices charged (191 F.2d 664).

The above case, we submit, is so remote from the case at bar as to have no bearing on it. The City argues that TWA was under obligation to get the 1942 contract approved by the Civil Aeronautics Board (Petition for Certiorari, pp. 28-29). The statute contains no such requirement. The City cites section 412 (49 U.S.C. 492), but that section by its terms is not applicable. It relates to pooling and other agreements *"between such air carrier, foreign air carrier, or other carrier."*

B. IT IS IMMATERIAL IN THE CASE AT BAR WHETHER OR NOT THE AIRPORT IS A PUBLIC UTILITY

(Answering Petition for Certiorari, pp. 9-12).

As held by the Court of Appeals the statutory authority of the City to make the contract in suit establishes its validity regardless of coexisting authority in the City (if such there was) to deal with the subject matter by rate regulation. Whether the airport is a public utility and what rate regulatory authority the City has there are not material questions in the case at bar (supra 7).

For the same reason the City's citations at page 10 of the petition for certiorari are immaterial. It may be added, however, that the cases do not hold that a municipal airport is necessarily a public utility (as the City says), but rather that it is a *public enterprise* justifying "the expenditure of municipal funds, the use of the tax power, the use of public properties or the use of condemnation proceedings" (Opinion, Court of Appeals, Appendix, Petition for Certiorari, p. vii, discussing the same cases now cited).[11]

C. THERE IS NO LEGAL OBJECTION TO FIXING PUBLIC UTILITY RATES BY CONTRACT WHERE THE STATUTE SO AUTHORIZES

(Answering Petition for Certiorari, pp. 13-16).

Contrary to the City's argument here made, public utility rates can be fixed by contract if the statute so authorizes (*United Gas Pipe Line Company v. Mobile Gas Service Corporation* (Feb. 27, 1956) 24 U.S. Law Week 4090, 4091, and many cases cited by the Court of Appeals; see also supra 6-7).

The petition cites the California Public Utilities Code, a section of the Federal Airport Act, two sections of the

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[11]As previously shown, the City does not treat the "airport" as a public utility, and claims utility rate-making power over only a small segment of airport operation (supra 11). The claim reduces itself to a complete absurdity in view of the charter provisions. Under section 130 of the charter (Appendix, this brief, p. v) the rates for a municipally owned public utility ("the airport" according to the City) must be sufficient to pay all expenses, including bond interest and amortization. The provision is simply impossible to apply where the bulk of airport revenue comes from unregulated sources, and utility rate-making power is asserted only with respect to the use of certain facilities by the airlines.

Civil Aeronautics Act, several decisions of the Supreme Court, and several state cases as prohibiting "discrimination." There is, however, no pleading, evidence or finding of discrimination in the case at bar (supra 16). The Supreme Court cases are not in point, as already shown (supra 15-16). For reasons already given, the case involves no infringement of federal statute (supra 3, 13-15). The state cases were distinguished by the Court of Appeals (Appendix, Petition for Certiorari, p. x). They all involved situations in which there was no statutory contracting authority, and one of them, *Limoneira Co. v. Railroad Commission* (1917) 174 Cal. 232, 162 Pac. 1033, quoted by the Court of Appeals (Appendix, Petition for Certiorari, pp. x-xi), expressly points out the distinction in situations where such authority exists.

D. THE 1942 CONTRACT WAS NOT SUBJECT TO CHANGE BY RATE REGULATION

(Answering Petition for Certiorari, pp. 16-18).

Of course, if the pertinent statute so provides, a contract may be initially valid, yet subject to change by the regulatory body, as is illustrated by *United Gas Pipe Line Company v. Mobile Gas Service Corporation* (Feb. 27, 1956) 24 U.S. Law Week 4090, 4091, already cited, and by *Texarkana v. Arkansas Gas Co.* (1939) 306 U.S. 188, 199-201. In the case at bar, however, the contract was authorized by statute and there was no statute subjecting it to subsequent change by regulation. Such a situation is governed by the cases cited by the Court of Appeals.

The cases cited on page 18 of the petition for certiorari (*Pinney & Boyle Co. v. L. A. Gas etc. Corp.* (1914) 168 Cal. 12, 141 Pac. 620) were cited to and distinguished by the Court of Appeals (Appendix, Petition for Certiorari, pp. ix-x). Typically, they were cases where a privately owned utility and a consumer executed a contract for utility service without specific statutory authorization, before there was a regulatory statute, or before the statute made regulation mandatory. None involved contracts authorized by statute for use of a municipally owned facility. The cases cited are simply not in point.

E. THE OPERATION OF THE AIRPORT IS NOT A "MUNICIPAL AFFAIR" OUTSIDE THE SCOPE OF THE GENERAL LAWS OF THE STATE

(Answering Petition for Certiorari, pp. 19-27).

The City here cites section 19 of Article XI of the California Constitution, under which it says that the airport is a "municipal affair." The cited provision, however, is not a municipal affair provision, as is apparent from its terms, and as was specifically decided in *Pac. Tel. & Tel. Co. v. City of Los Angeles* (1955) 44 Cal. 2d 272, 281, 282 P.2d 36. This case overruled the precise contention that under section 19 of Article XI the granting of a franchise to engage in the telephone business is a municipal affair, and hence subject to municipal control and not subject to the general laws of the state.

The absolute lack of merit in the argument that under California law an international airport is a "municipal affair" has, we submit, been demonstrated (supra 4-5).

F. THE VALIDITY OF THE CONTRACT DOES NOT DEPEND ON ANY ADMINISTRATIVE ACTION TO BE TAKEN BY THE CIVIL AERONAUTICS BOARD

(Answering Petition for Certiorari, pp. 27-31).

The City here argues that this case should be abated until TWA gets the 1942 contract approved by the Civil Aeronautics Board, citing section 412 of the Civil Aeronautics Act (49 U.S.C. 492). As already shown, this section relates only to *contracts between air carriers* (supra 17).

Several sections of the Civil Aeronautics Act cited at the bottom of page 29 of the petition are not quoted, but the bare reference made by the petition to their subject matter is enough to show them inapplicable.

The case of *S. S. W., Inc. v. Air Transport Ass'n of America* (D.C.Cir. 1951) 191 F.2d 658, creates no conflict with and is not relevant to the case at bar as already shown (supra 15-16).

As noted before, all these points were first raised by the City in its petition for rehearing in the Court of Appeals.

G. THE STATE PUBLIC UTILITIES COMMISSION HAS NO JURISDICTION IN THIS MATTER

(Answering Petition for Certiorari, pp. 31-34).

The City here claims that "If the operation of the airport is neither a municipal nor federal affair, it must be a state affair controlled by the Public Utilities Commission of the State of California." Under the California Constitution (Art. XII, sec. 23), however, the state Commission has no jurisdiction over municipally owned pub-

lic works. This is explicitly held in California cases cited in the petition for certiorari (see, for example, *Polk v. City of Los Angeles* (1945) 26 Cal.2d 519, 539, 150 P.2d 931; Petition for Certiorari, p. 23). The jurisdiction of the State Public Utilities Commission extends only to the regulation of intrastate rates of common carriers by air (*People v. Western Air Lines, Inc.* (1954) 42 Cal.2d 621, 268 P.2d 723).

CONCLUSION

(Answering Petition for Certiorari, pp. 34-35).

This case turns on questions of California law, which the Court of Appeals decided correctly. The belatedly raised questions under federal acts are insubstantial. There is no conflict of decisions. We respectfully submit that the petition for writ of certiorari should be denied.

Dated: San Francisco, California,
April 5, 1956.

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(Appendix Follows.)

Appendix

CONSTITUTION OF THE STATE OF CALIFORNIA

Article XI, Section 6 [in part]:

"Municipal corporations

Sec. 6. * * * Cities and towns hereafter organized under charters framed and adopted by authority of this Constitution are hereby empowered, and cities and towns heretofore organized by authority of this Constitution may amend their charters in the manner authorized by this Constitution so as to become likewise empowered hereunder, to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters, and in respect to other matters they shall be subject to and controlled by general laws."

Article XI, Section 8(j) [in part]:

"Municipal Affairs

It shall be competent in any charter framed under the authority of this section to provide that the municipality governed thereunder may make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws."

CALIFORNIA MUNICIPAL AND COUNTY AIRPORT LAW

Cal.Stats. 1927, c. 267, p. 485:

"**Section 1.** Any city and county, or county, or city operating under a freeholders' charter, or otherwise, or any town, or any municipal corporation, in the State of California, is hereby authorized and empowered to acquire by purchase, condemnation, donation, lease or otherwise real or personal property, or to use any real property owned by it, or which it may hereafter acquire, within or without its corporate limits for a site upon which an airport or airports may be maintained and upon which any such city and county or county or city or town or municipal corporation may erect and maintain or permit the erection and maintenance of hangars, mooring masts, flying fields, and all places for flying take-off and landing of aircraft and the storage of the same when not in active use, together with signal lights, radio equipment, service shops, conveniences, appliances, works, structures and other air navigation facilities, now known or hereafter invented, of such number and character and in such places as may be necessary or convenient, and to levy taxes for the purpose of raising funds to acquire lands for the purposes mentioned in this act and to pay the principal and interest of any bonds issued pursuant hereto.

[Here follow provisions allowing municipalities to use lands held for park purposes for airports.]

Section 2. [Provides for incurring indebtedness to carry out purposes of Section 1].

Section 3. [Provides procedure for issuance of bonds for airport purposes.]

Section 4. In connection with the erection or maintenance of any such airport or airports, or air navigation facilities, any such city and county, or county, or city operating under a freeholders charter or otherwise, or town, or any municipal corporation, shall have the power and jurisdiction to regulate the receipt, deposit and removal, the embarkation or debarkation of passengers or property to and from such landing places or moorage as may be provided, to exact and require charges, fees and tolls, together with a lien to enforce their payment, to lease or assign for operation such space or area, appurtenances, appliances or other conveniences necessary or useful in connection therewith, to own and operate municipal aircraft, to employ pilots, to provide rules and regulations covering the use of such airport and facilities and the use of other property or means of transportation within or over the said airport, to perform any duties necessary or convenient for the regulation of air traffic, to enter into contracts or otherwise cooperate with the federal government or other public or private agencies, and otherwise exercise such powers as may be required or convenient in the promotion of aeronautics and the furtherance of commerce and navigation by air.

Section 5. All acts and parts of acts inconsistent with the provisions of this act are hereby repealed."

(This statute was repealed in 1949, except sec. 3, Cal. Stats. 1949, c. 81, p. 327, but similar provisions immediately effective were included in the Government Code, secs. 50,470 et seq.)

CHARTER OF THE CITY AND COUNTY OF SAN FRANCISCO

Cal.Stats. 1931, c. 56, p. 2978:

"Powers of the City and County.

Section 2 [in part]. The City and County of San Francisco * * * may, subject to the restrictions contained in this charter, purchase, receive, hold and enjoy, sell, lease and convey real and personal property."

"Lease of City Property.

Section 93 [as worded on October 1, 1942, Cal.Stats. 1931, p. 3035, provided, among other things, for lease terms not to exceed 20 years.]

Cal.Stats. 1931, c. 56, p. 3047.

"General Powers and Duties of Commission.

Section 121 [in part]. The public utilities commission shall have charge of the construction, management, supervision, maintenance, extension, operation and control of all public utilities and other properties used, owned, acquired, leased or constructed by the city and county, including airports, for the purpose of supplying any public utility service to the city and county and its inhabitants, to territory outside the limits of the city and county, and to the inhabitants thereof."

Cal.Stats. 1931, c. 56, p. 3051.

"Rates.

Section 130 [in part]. The Commission shall have power to fix, change and adjust rates, charges or fares for the furnishing of service by any utility under its jurisdiction,

and to collect by appropriate means all amounts due for said service, and to discontinue service to delinquent consumers, and to settle and adjust claims arising out of the operation of any said utilities.

* * * * *

Rates for each utility shall be so fixed that the revenue therefrom shall be sufficient to pay, for at least the succeeding fiscal year, all expenses of every kind and nature incident to the operation and maintenance of said utility, together with the interest and sinking fund for any bonds issued for the acquisition, construction or extension of said utility; * * *"

FEDERAL CIVIL AERONAUTICS ACT OF 1938

June 23, 1938, 52 Stat. 977, 49 U.S.C. 401 et seq.

49 U.S.C. 453. "Expenditure of Federal funds [in part]

* * * There shall be no exclusive right for the use of any landing area or air navigation facility upon which Federal funds have been expended."

49 U.S.C. 483. "Tariffs of air carriers [in part]

(a) Every air carrier and every foreign air carrier shall file with the Board, and print, and keep open to public inspection, tariffs showing all rates, fares, and charges for air transportation between points served by it, and between points served by it and points served by any other air carrier or foreign air carrier when through service and through rates shall have been established, and showing to the extent required by regulations of the Board, all classifications, rules, regulations, practices, and services in connection with such air transportation. * * *"

49 U.S.C. 484. "Rates for carriage of persons and property [in part]

(a) It shall be the duty of every air carrier * * * to establish, observe, and enforce just and reasonable individual and joint rates, fares, and charges, and just and reasonable classifications, rules, regulations, and practices relating to such air transportation; * * *

(b) No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

(c) The Board is empowered and directed to investigate and report to the Congress within one year from the effective date of this section, to what extent, if any, the Federal Government should further regulate the rates, fares, and charges of air carriers engaged in foreign air transportation, and the classifications, rules, regulations, and practices affecting such rates, fares, or charges."

49 U.S.C. 642. "Complaints to and investigations by Board [in part]

* * * * *

(d) Whenever, after notice and hearing, upon complaint, or upon its own initiative, the Board shall be of the opinion that any individual or joint rate, fare, or charge demanded, charged, collected or received by any air carrier for interstate or overseas air transportation,

or any classification, rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, is or will be unjust or unreasonable, or unjustly discriminatory, or unduly preferential, or unduly prejudicial, the Board shall determine and prescribe the lawful rate, fare, or charge (or the maximum or minimum, or the maximum and minimum thereof) thereafter to be demanded, charged, collected, or received, or the lawful classification, rule, regulation, or practice thereafter to be made effective: *Provided,* That as to rates, fares, and charges for overseas air transportation, the Board shall determine and prescribe only a just and reasonable maximum or minimum or maximum and minimum rate, fare, or charge."

FEDERAL AIRPORT ACT

May 13, 1946, 60 Stat. 170, 49 U.S.C. 1101 et seq.

49 U.S.C. 1110. "Project sponsorship; requirements; contracts between Administrator and public agencies [in part]

As a condition precedent to his approval of a project under this chapter, the Administrator shall receive assurances in writing, satisfactory to him, that—

(1) the airport to which the project relates will be available for public use on fair and reasonable terms and without unjust discrimination;"

[Seven other subsections follow.]